The Hubbard Company *and* Toledo Typographical Union No. 63, International Typographical Union, AFL-CIO. Case 8-CA-14496

July 29, 1981

DECISION AND ORDER

Upon a charge filed on December 30, 1980, and amended on January 26, 1981, by Toledo Typographical Union No. 63, International Typographical Union, AFL-CIO, herein called the Union, and duly served on The Hubbard Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint on January 27, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 25, 1980, following a Board election in Case 8-RC-12094, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about June 30, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On February 4, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent filed an amended answer to the complaint on March 2, 1981. On March 12, 1981, the Acting Regional Director for Region 8 issued an amendment to the complaint and on March 18, 1981, Respondent filed an answer to the amendment to the complaint.

On April 9, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 22, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent admits, in part, the factual allegations as to the Union's request to bargain and its own refusal to do so. Respondent disputes, however, the complaint's allegations as to the operative dates of these events. Respondent further asserts that the Union's certification was improper on the basis of the Regional Director's and the Board's error in sustaining the Union's challenge to the determinative ballot of employee Steve Hall. Respondent also raises again its contention that the Board erred in failing to grant Respondent an evidentiary hearing on the challenge.

The General Counsel argues that all material issues have been previously presented to, and decided by, the Board, and that there are no litigable issues of facts requiring a hearing. We agree with the General Counsel.

Our review of the record herein, including the record in Case 8-RC-12094, reveals that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on April 11, 1980, which resulted in a vote of 11 for, and 10 against, the Union, with 1 challenged ballot. The Union filed four objections, all of which it agreed to waive if the outcome of the challenged ballot did not affect the results of the election.

After investigation, the Regional Director issued a Report on Challenged Ballot and Objections, in which he recommended that the Union's challenge to Hall's ballot be sustained. The Regional Director concluded that Hall, the son-in-law of Respondent's president and majority stockholder, enjoyed a special status as to terms and conditions of employment and therefore did not share a community of interest with the other employees. The Regional Director overruled three of the Union's objections, sustained one of them, but recommended, in view of his disposition of the challenge, that the Union be certified. Thereafter, Respondent filed timely exceptions to the Regional Director's report. On August 25, 1980, the Board, having considered the Regional Director's report, Respondent's exceptions, and the entire record, adopted the findings and recommendations of the Regional Director and certified the Union as the exclusive bargaining rep-

[1] Official notice is taken of the record in the representation proceeding, Case 8-RC-12094, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

resentative of the employees in the unit stipulated to be appropriate.[2]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

With respect to its contention that it is entitled to a hearing on its objections, we find it to be without merit as the Board has held, with judicial approval, that evidentiary hearings are not required in unfair labor practice cases where, as here, there are no substantial or material facts to be determined and in such cases summary judgment is appropriate.[4] Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is now, and has been at all times material herein, an Ohio corporation engaged in the business of operating a printing plant and selling of office supplies at its Defiance, Ohio, facility. Annually, in the course and conduct of its business, Respondent ships goods valued in excess of $50,000 directly to points located directly outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Toledo Typographical Union No. 63, International Typographical Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees including all delivery employees employed by the Employer at its Defiance, Ohio, facility but excluding all office clerical employees, sales employees, customer service employees and professional employees, guards and supervisors as defined in the Act.

2. The certification

On April 11, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 8, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on August 25, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 8, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 10, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since September 10, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor

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[2] Not published in volumes of Board Decisions. Former Member Penello dissented in the proceeding. He would have remanded the proceeding to the Regional Director for a hearing on Hall's status.

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] *Handy Hardware Wholesale, Inc.*, 222 NLRB 373 (1976); *Janler Plastic Mold Corporation*, 191 NLRB 162 (1971); *Crest Leather Manufacturing Corporation*, 167 NLRB 1085 (1967), and cases cited herein.

practices within the meaning of Section 8(a)(5) and (1) of the Act.[5]

C. *Additional Violations of Section 8(a)(5) and (1) of the Act*

The complaint alleges, and Respondent admits, that Respondent implemented an across-the-board wage increase for the unit employees during the first week of July 1980. That date occurred after the election but before the certification.

It is well established that an employer violates Section 8(a)(5) and (1) of the Act when it makes unilateral changes in terms and conditions of employment during the pendency of objections to an election which eventually results in the certification of the Union. See *Mike O'Connor Chevrolet-Buick-GMC Co., Inc. and Pat O'Conner Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701 (1974). The above-described unilateral change instituted by Respondent clearly relates to a critical term of employment. Accordingly, we conclude, as alleged in the complaint, that, by the foregoing conduct, Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.[6]

The complaint further alleges, and Respondent admits, that, following the Union's certification and the Union's September 8, 1980, request to bargain, Respondent has engaged in the following unilateral conduct: (1) implementing changes in certain wage rates of the employees in the bargaining unit during the first full week in October 1980; (2) implementing on December 1, 1980, a new insurance policy covering the unit employees; and (3) granting pay increases to unit employees in January 1981. Additionally, the complaint alleges, and Respondent admits, that since on or about October 7, 1980, the Union has requested Respondent to furnish it with the wage rate and date of hire of each employee, job classification and job description for each employee, data on insurance and pension plans, incentive plan, merit increases and merit rating scores, and production standards used in determining merit rates and job evaluation systems, and that since the date of that request Respondent has failed and refused to furnish the Union with the requested information. The complaint further alleges, and we find, that, by the foregoing conduct, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.[7]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

Further, we have found that, during the period that objections and challenges to the election were pending, Respondent engaged in unlawful conduct by unilaterally granting a wage increase to unit employees in July 1980. We have also found that Respondent engaged in unlawful conduct following the Union's certification by unilaterally (1) implementing wage changes during the first full week in October 1980; (2) implementing a new insurance policy on December 1, 1980; and (3) granting wage increases during January 1981. We shall order Respondent to make whole any unit employees who

[5] The complaint also alleges that "since on or about June 30, 1980 and continuing to date" the Union has requested, and is requesting, Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective-bargaining representative of the unit employees and that Respondent, at all times since that date, has thereby violated Sec. 8(a)(5) and (1). We find it unnecessary to reach the issue of whether Respondent's refusal to recognize and bargain with the Union prior to the Union's August 25, 1980, certification and the admitted September 8, 1980, request to meet and bargain constitutes, in itself, a violation of the Act. In this regard, we note that the complaint alleges, and Respondent does not dispute, the continuing nature of the Union's requests. Furthermore, as discussed below, Respondent's unilateral conduct during the period between June 30, 1980, and the Union's certification on August 25, 1980, was violative of Sec. 8(a)(5) and (1) of the Act and our Order with respect to that violation effectively remedies Respondent's misconduct during the precertification period.

[6] The Board finds Respondent's contention that this allegation is barred by Sec. 10(b) of the Act to be without merit. The operative date of the unilateral wage increase, the first week in July 1980, is clearly within the 6-month statutory period dated from the filing of the original charge on December 30, 1980.

[7] Respondent, while admitting the refusal, denies that the requested information is necessary and relevant for the Union's performance of its function as the exclusive bargaining representative of the unit employees. There is therefore no issue of fact presented by Respondent's denial. The Union as collective-bargaining representative is entitled to wage rates, job classifications, job descriptions, and dates of hire, see *Evans Rotork, Inc.*, 251 NLRB 660 (1980); data on insurance and pension plans, see *Nappe-Babcock Company*, 245 NLRB 20 (1979); data on incentive plans, merit increases, and merit rating scores, see *Irwindale Division of Lau Industries, a Division of Philips Industries, Inc.*, 219 NLRB 364 (1975); and production standards used in determining merit ratings and job evaluation systems, see *Western Massachusetts Electric Company*, 234 NLRB 118 (1978).

may have suffered any monetary losses by reason of the aforementioned changes in terms and conditions of employment in the manner prescribed by *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).[8] Our Order, however, is not to be construed as requiring a rescission of the wage increases and/or benefits previously granted to unit employees.

We have further found that Respondent unlawfully has refused the Union's request to furnish it with certain information that is necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of the unit employees. Therefore, we also shall order that Respondent, upon request by the Union, furnish the Union with the information sought.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Hubbard Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Toledo Typographical Union No. 63, International Typographical Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees including all delivery employees employed by the Employer at its Defiance, Ohio, facility but excluding all office clerical employees, sales employees, customer service employees and professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 25, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By the acts described in section III, above, Respondent has refused to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit described above, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Hubbard Company, Defiance, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Toledo Typographical Union No. 63, International Typographical Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees including all delivery employees employed by the Employer at its Defiance, Ohio, facility but excluding all office clerical employees, sales employees, customer service employees and professional employees, guards and supervisors as defined in the Act.

(b) Unilaterally granting wage increases to unit employees, unilaterally implementing other wage changes, and unilaterally implementing a new insurance policy covering unit employees.

(c) Refusing to furnish the Union with the wage rate and date of hire of each employee, job classification and job description for each employee, data on insurance and pension plans, incentive plan, merit increases and merit rating scores, and production standards used in determining merit ratings and job evaluation systems.

[8] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on any backpay due based on the formula set forth therein.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole any employees who may have suffered monetary losses by reason of the unilateral changes effected by Respondent July 1980, October 1980, December 1, 1980, and January 1981, in the manner prescribed in the section of this Decision entitled "The Remedy."

(c) Upon request, furnish the Union with the wage rate and date of hire of each employee, job classification and job description for each employee, data on insurance and pension plans, incentive plan, merit increases and merit rating scores, and production standards used in determining merit ratings and job evaluation systems.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Defiance, Ohio, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of appeals enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Toledo Typographical Union No. 63, International Typographical Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT unilaterally grant wage increases to unit employees, unilaterally implement other wage changes, or unilaterally implement a new insurance policy covering unit employees. This does not mean that we are now required to lower any wages or benefits presently established for unit employees.

WE WILL NOT refuse to furnish the Union with necessary and relevant information it has requested with respect to all unit employees, as hereinafter set forth.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees including all delivery employees employed by the Employer at its Defiance, Ohio, facility but excluding all office clerical employees, sales employees, customer service employees and professional employees, guards and supervisors as defined in the Act.

WE WILL, upon request, furnish the Union with the wage rate and date of hire for each employee, job classification and job description for each employee, data on insurance and pension plans, incentive plan, merit increases and merit rating scores, and production standards used in determining merit ratings and job evaluation systems.

WE WILL make whole any employees who may have suffered monetary losses by reason of the unilateral changes effected by us July

1980, October 1980, December 1, 1980, and January 1981, with interest.

THE HUBBARD COMPANY